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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-869

OLYMPIA BREWING COMPANY, a corporation,
Petitioner,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF THE UNITED STATES BREWERS ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE UNITED STATES BREWERS ASSOCIATION AS AMICUS CURIAE

I. INTEREST OF THE AMICUS CURIAE

The United States Brewers Association, Inc., is the oldest trade association in the United States. Its principal office is located at 1750 K Street, Northwest, Washington, D.C., 20006. The Association's membership includes most of the manufacturers of beer in the United States.

This brief is submitted with the written consent of both parties in support of the Petition for Writ of Certiorari from a decision of the Supreme Court of the State of Oregon.

The Interstate Income Tax Act, Public Law 86-272, 73 Stat. 555, 15 U.S.C.A. §381, (Petition, Appendix C*) and its interpretation and application by the State of Oregon are at issue. Public Law 86-272 prohibits a State from imposing an income tax on interstate commerce conducted by out-of-state businesses which limit their business activities within the taxing State to solicitation of orders and the delivery of tangible personal property from a point outside the State.

The value of beer shipped in the United States during 1972 amounted to $4,289,000,000.00. Beer shipped by members of the Association had an approximate value of $3,800,000,000.00. As a minimum at least one-half of this amount involves shipment in interstate commerce.

Approximately 17.6 million barrels of draft beer were consumed in the United States during 1972. It is estimated that 15.8 million barrels of this amount and the major quantity of draft beer sold in interstate commerce is produced by the members of the United States Brewers Association. Of necessity, all beer is packaged or containerized before delivery. Draft beer is placed in one-half, one-quarter and one-eighth barrel containers referred to as kegs, or collectively as "cooperage."

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* References are to Appendices in the Petition for Writ of Certiorari.

Beer containerized in kegs regularly, if not daily, crosses the boundaries of all fifty States and the District of Columbia. At least eighteen States and the District of Columbia must rely entirely on shipments in interstate commerce for their total supply of beer.

The Supreme Court of Oregon has held that Olympia Brewery, incorporated under the laws of the State of Washington, is subject to Oregon income tax, because Olympia's beer kegs are present in Oregon for the purpose of dispensing beer. The court rendered its decision without applying Public Law 86-272 to exempt from tax the income in interstate commerce of a foreign corporation whose only activity in the taxing State is the solicitation of orders followed by shipment or delivery from a point outside of the State.

Obviously, the only way that draft beer can be shipped or delivered is in kegs, the value of which is such that they are retained as property of the brewers and returned. This factor is also in the interest of ecology.

There are special and important reasons for granting the Petition for Writ of Certiorari in this case:

(a) The Supreme Court of Oregon has decided a federal question of substance not heretofore determined by this Court, i.e., that the nature of packaging used to deliver tangible personal property in a transaction otherwise immune from the taxation of interstate commerce (presence of returnable kegs to which Olympia hold title) in a State can defeat the immunity provided by Public Law 86-272 from taxation of income in interstate commerce.

(b) The Supreme Court of Oregon in deciding this important federal question did not refer to any federal precedent in reaching its conclusion. In fact, the court rendered its decision without reference to the decision of the United States Supreme Court in *Heublein, Inc.* v. *South Carolina Tax Commission,* 409 U.S. 275 (1972), although the effect of *Heublein* or its inapplicability were argued before that Oregon Court by both parties on appeal.

(c) *American Refrigerator Transit Co.* v. *Tax Commission,* 238 Or. 340, 395 P.2d 127 (1964), was the only case relied upon in the present case by the Tax Court in that portion of its opinion which was adopted by the Supreme Court of Oregon. That case is clearly distinguishable, but it can be assumed that Oregon will continue to impose taxes upon the income of foreign brewers and other concerns which maintain title to returnable kegs and containers unless the opinion in the present case is reversed.

While the nation-wide implications of the holding that beer kegs provide nexus for taxation of income may in itself be a sufficient ground for consideration by the Supreme Court, the facts here are particularly suitable for a determination of what constitutes "solicitation." The facts are undisputed, having been stipulated to at the inception of the litigation. Moreover, the facts relate activities of Olympia's representatives substantially similar to those of brewers generally who engage in sales in interstate commerce.

(e) The cost of compliance with state income tax laws and the payment of state income taxes are a substantial expense of conducting interstate business, especially burdensome to small and medium size busi-

nesses. A consideration by the Supreme Court of the United States of the issues here will serve to clarify the application of Public Law 86-272 thereby avoiding the possibility of extensive litigation within the States.

(f) Because it is not unlikely that the taxing authorities of all fifty States and the District of Columbia will await the outcome of this case in adopting their future interstate income tax policies, the Association and its members have a direct and substantial interest in the questions presented by the Petition for Writ of Certiorari.

(g) Unless reversed the decision will have a detrimental effect not only upon the brewing industry generally but upon other businesses; and, the principles of a broad national economy envisioned by framers of the Constitution, and the effectiveness of Public Law 86-272 will be further eroded.

II. ARGUMENT

A. Olympia Has Not Engaged in Activities in Oregon Which Remove It from the Protection of Public Law 86-272.

Olympia Brewing Company, incorporated under the laws of the State of Washington with its home office and brewery in Olympia, Washington, has no office, brewery, or other operating facility or inventory of beer in the State of Oregon. (Petition, Appendix D, 35).

Olympia's representatives engage in activities in Oregon to promote Olympia's beer. Orders resulting from their activities are not accepted by them but are submitted by retail outlets to the Oregon distributors servicing the area. The Oregon distributors send

orders directly to the Brewery at Olympia, Washington, where they are accepted and filled by shipment to points in Oregon via common or contract carrier. (Petition, Appendix D, 36-39).

Draft beer is shipped to Oregon in kegs to which Olympia retains title. After being emptied (not by Olympia or its representatives), the kegs are returned by the distributor via common or contract carrier to the brewery in Washington State. This is the regular practice as more fully set forth in the Petition. (Petition, Appendix D, 38-39).

Oregon has imposed a tax on the net income of Olympia from Oregon sources on the ground that the presence of Olympia's kegs in Oregon constitutes sufficient nexus to avoid the immunity afforded by Public Law 86-272. (Petition, Appendix B, 30-32).

Public Law 86-272 exempts a business from income taxation in a State if its:

> ". . . only business activities within such State . . . are . . . the solicitation of orders . . . in the name of, or for the benefit of a particular customer . . . if orders by such customer . . . are . . . [sent outside the State for acceptance or rejection and, if approved, are filled by shipment or delivery from a point outside the State]." [Pub. L. 86-272, 15 U.S.C. §381; Petition, Appendix C, 33].

The activities of Olympia's agents are undisputed. Upon review of these activities the Oregon Tax Court found they amounted to no more than "solicitation," as follows:

> "It has been stipulated that the Olympia salesmen (a) seek to influence retailers to purchase

> Olympia bottled, canned and draft beer; (b) seek to influence retailers to continue to carry or to switch to the use of draft beer; (c) with the retailer's permission, seek to obtain a maximum display of Olympia advertising at each retail outlet, including prominent display of the product; and (d) regularly inspect each retailer's supplies of beer in order to call attention to the retailer of a potential shortage thereof." (Petition, Appendix A, 24).

The Tax Court rightly held that solicitation involves not only making an approach, but has the connotation of inducing and moving to action:

> ". . . and is ordinarily accompanied by those devices which influence, create receptivity, or claim the attention of the prospect. All of the activities of Plaintiff above described would come under these connotations. *It can be argued that Plaintiff's total profit making effort, in and out of state, could be included under the broad generalization of* 'salesmanship' . . ." [(Emphasis added), Petition, Appendix A, 24, 25].

The language of the statute is clear and unambiguous. The activities of Olympia's agents in Oregon were found to constitute no more than solicitation. (Petition, Appendix A, 25). Its orders were filled by shipment from a point outside the State. The brewery clearly falls within the exemption of the federal statute unless something else removes it.

B. The Facts in the Present Case Lend Themselves to a Determination of the Meaning of "Solicitation" by This Court Which Would Be Applied Throughout the United States.

The Supreme Court of Oregon did not treat the question of the activities of Olympia's representatives or solicitation at all. It merely held that the *presence*

of Olympia's *beer kegs* in Oregon for the purpose of dispensing beer was sufficient to subject Olympia to income tax by Oregon. It neither adopted nor rejected the Tax Court's rationale on the issue of solicitation but adopted without discussion the Tax Court's reasoning respecting the kegs. [1]

The activities engaged in by Olympia are substantially similar to those of most breweries in the United States. The nature of these activities is undisputed, having been stipulated to by the parties. (Petition, Appendix D, 35-39).

Should the Supreme Court decide to grant the Petition herein because of the nation-wide implications of the holding that the presence of kegs after solicitation constitutes nexus to tax income of an out-of-state business, it is submitted that this case provides an excellent opportunity also for determination of definitive guidelines for the scope of solicitation, which would have general applicability throughout the United States. This would remove present uncertainty and avoid a multiplicity of future litigation.

The Tax Court's holding that the activities of Olympia's representatives constitute no more than solicitation conforms to a general principle gleaned from the decisions: An activity falls within the category of solicitation for purposes of Public Law 86-272 where the generation of sales is the direct and immediate objective of the activity. See, *Iron Fireman Mfg. Co.* v. *State Tax Commission,* 3 OTR 33 (1967) affirmed, 251 Or. 227, 445 P.2d 126 (1968); *Briggs & Stratton Corp.* v. *State Tax Commission,* 3 OTR 174

[1] Hence the reasoning of the Oregon Tax Court is referred to throughout this brief.

(1968); *Herff Jones Co.* v. *State Tax Commission,* 247 Or. 404, 430 P.2d 998 (1967), affirming 2 OTR 207 (1965); *Cal-Roof Wholesale, Inc.* v. *State Tax Commission,* 242 Or. 435, 401 P.2d 233 (1966).

C. Holding Bare Legal Title to Returnable Kegs Is Not an Activity, nor Is Their Presence in Oregon Such "Involvement" as Creates Nexus. To Hold So Is Contrary to the Plain Meaning of Words and Defeats the Purpose of the Statute.

In reaching out for taxable nexus by looking at the presence of kegs the Tax Court asked: "Is the Plaintiff's regular use of the beer kegs such local 'activity' or 'involvement' as to constitute sufficient nexus under PL 86-272?" (Petition, Appendix A, 26).

Holding bare legal title to kegs is neither activity nor involvement by any business presence of Olympia in Oregon.[2]

The law exempts those corporations whose "activities" within the State are limited. Any doubt on this question is resolved by the Report of the Senate Finance Committee where it is stated that the approach of the bill ". . . may be referred to as a 'minimum activities type of approach'." S. Rep. No. 658, 86th Cong., 1st Sess. (1959).

To sustain its holding on nexus the Tax Court relied upon a law journal article, *Developing Jurisdictional Standards for Multistate Corporate Net Income,* 22 Hastings L.J. 1035, 1041 (1971). Both the article and

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[2] The Supreme Court has described the immunity of Public Law 86-272 as applying to a recipient of income which confines ". . . its *business* within the state." to solicitation of orders filled from outside points. *Heublein, Inc.* v. *South Carolina Tax Commission, supra,* 409 U.S. 275, 278 (1972)

decision speak in terms of "substantiality" of activity or involvement. Congress has decided solicitation plus shipment or delivery from another state are not activity *substantial* enough to justify taxation of interstate income from the sale of tangible personal property. The law journal article refers to standards in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959). The decision of the Supreme Court in that case motivated enactment of Public Law 86-272 to nullify its effect.

The Tax Court reasoned that the *presence* of Olympia's *kegs* in Oregon is the *result of sales* and not a part of solicitation. The presence of Olympia's *beer* in Oregon is the *result of sales.* It is packaged in bottles, cans, and kegs. The *presence* in Oregon of tangible personal property sold by other out-of-state businesses is also a *result of sales;* such property is likewise shipped in disposable or returnable packages or containers to which businesses may or may not retain title, ranging from paper, glass and cardboard, to drums of syrup for soft drinks, oil and chemical drums, and refillable tanks for such gases as propane, oxygen, acetylene.

The Tax Court recognized that "the use of beer kegs in the delivery of beer is quite possibly an inseparable factor of the business" (Petition, Appendix A, 28) but concluded that by their nature not all businesses can claim the benefits of the statute. This rationale ignores the fact that *the kegs are an inseparable factor of "delivery" not of "business."*[3]

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[3] The nature of the business protected by Public Law 86-272 is the interstate sale of tangible personal property. The nature of businesses not protected is all other businesses including the sale of insurance and intangibles. See remarks of Senator Byrd in floor debate, 105 Cong. Rec. 16355 (August 19, 1959).

The business of Olympia and of brewers in general is the production and sale of beer. Brewers derive income from the sale of beer, not from ownership or trading in kegs.

To exempt shipment or delivery from points outside a state and then impose tax because the article shipped is present in packaged form defeats the purpose of Public Law 86-272.

Surely it can be assumed Congress was aware that practically all items of tangible personal property crossing state lines in interstate sales, particularly liquids, are necessarily containerized or packaged.[4]

Had Congress wished to deny immunity on the basis of the nature of the container used it would have done so. There is nothing in Public Law 86-272 or its legislative history to support denial of the immunity because of the container used.[5]

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[4] That a keg is but a necessary container or package for beer appears axiomatic. This fact is recognized in the 1971 Amendments to the Alcohol Tax Provisions of the Internal Revenue Code, 84 Stat. 2054, 26 USCA 1516: "*Definitions of package and packaging:* For purposes of this subchapter, the term 'package' means a bottle, can, keg, barrel, or other original consumer container and the term 'packaging' means the filling of any package."

[5] In *Smith, Kline & French* v, *State Tax Commission*, 241 Or. 50, 55, 403 P. 2d 375, 377 (1965), the Supreme Court of Oregon, sitting En Banc, decided on June 16, 1965, that the "activities" of the Company's detail men who visited hospitals, doctors and druggists to explain the usefulness of plaintiff's products met the statutory requirements of solicitation affording exemption under Public Law 86-272. The Court stated that the Congressional Reports: ". . . show that Congress intended to exempt not only the specified solicitation phase of interstate sales efforts, but *also lesser, included phases.*" (Emphasis added).

Congress also intended to exempt *lesser included phases* of "*shipment or delivery.*" Otherwise the phrase would be rendered meaningless. *A returnable package or keg is but a lesser included phase of delivery.* A beer keg is neither a business, nor a place of business.

To decide that the presence of a particular form of package, in this instance returnable kegs, constitutes taxable "nexus" is contrary to the plain meaning of the statute and virtually destroys its effect. The whole purpose of the statute is to exempt from taxation income from interstate sales where the only "activity" in the state is solicitation, and the shipment or delivery of tangible personal property is from a point outside the state. Looking to the package for nexus engrafts an unwarranted restriction on Public Law 86-272 never within the contemplation of the Congress.[6]

The Statute speaks to "activities" within the state. One cannot conceive of ownership of returnable kegs as an activity in any sense of the word. The plain meaning of "activity" confirms that bare legal title or ownership is not activity.[7]

Olympia's activity in Oregon stops when solicitation ends and orders are forwarded to the brewery in Washington State. Where is there an activity by Olympia after kegs are loaded on carriers in Washington State for delivery on behalf of the independent distributors?

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[6] The remarks of Senator Byrd and others during floor debate on the bill emphasized that the property presence necessary to deny exemption is in effect a business presence consisting of physical facilities, general offices, warehouses, and stocks of goods, see 105 Cong. Rec. 16354-16363, 86th Cong., 2nd Sess. (August, 1959).

[7] "ac tiv i ty, *n.*; *pl.* ac tiv i ties. 1. the quality or state of being active; action; motion; use of energy.

2. normal power of mind or body; energetic action; nimbleness; agility; animation.

3. an active force.

4. any specific action or pursuit; as, outside activities. Syn.—briskness, liveliness, animation." Webster's New Twentieth Century Dictionary Unabridged, 20 (2nd ed. 1965).

The brewery has neither dominion nor control over the kegs until they are returned to the State of Washington. Many kegs will never be returned. This lack of dominion and control is not peculiar to Olympia but is true of brewers generally.

To suggest that so remote a factor as its bare legal title to the kegs provides a business presence strains logic. The Report of the Senate Finance Committee on Public Law 86-272 is clear in its expression that:

> ". . . if the only *business presence* within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed S. Rep. No. 658, 86th Cong., 1st Sess. 6, 7, 1959. (Emphasis added).

It is no answer to suggest that the *presence* of substantial numbers of kegs essential to package draft beer constitutes "an *intrastate activity,* after delivery of the goods." Analogizing the presence of kegs to the lending of vehicles for the local distribution of beer disregards the fact that Olympia does not engage in any activities related to local distribution; nor are the kegs "involvement" by Olympia in local distribution. Olympia's activities with the kegs cease at the brewery miles outside the Oregon border and do not resume until the kegs are returned to the brewery in Washington State for refilling.

Logic does not support a finding that beer kegs provide nexus for the taxation of interstate income. It has been held that *an automobile does not constitute nexus* in a state although it is owned by an out-of-state corporation and is used and operated solely within the confines of the state for solicitation by employees of the out-of-state company. *State ex rel Ciba* v. *State Tax Commission,* 382 S.W. 2d 645 (1964). A business exercises control over its vehicles which are operated by the direct action of its employees.

Neither the brewery nor its representatives exercise control over the kegs after they are loaded on trucks in Washington State. Even the independent distributor cannot exercise control over the kegs after intrastate delivery by him to the retailer. Similarly retailers cannot exercise control over kegs in the possession of the ultimate consumer. Many kegs never find their way back to the retailer, or to the distributor, much less to the brewer. This is a condition unfortunately common to the brewing industry.

It can be assumed that Olympia (or any brewer) could deliver the beer in its own trucks upon order from points outside Oregon directly to the Oregon distributors or from such points directly to the retailers without losing immunity from Oregon income tax. Nothing in Public Law 86-272 would prevent such activity. Olympia does not use its own trucks nor deliver to retailers. Deliveries are made directly by independent carrier to the distributors. (Most brewers ship beer f.o.b. brewery and therefore do not designate the carrier; but, shipments f.o.b. distributor or f.o.b. retailer would be equally permissible under the Law.)

The language of Public Law 86-272 permits the out-of-state seller to select the means of conveying his product. Even if presence of the kegs could be held to be an "activity," the Oregon Tax Court has found that the word "delivery" implies that the vendor may use his own conveyances, and retain exemption from Public Law 86-272. *Atlas Foundry* v. *Commission,* 2 OTR 200 at 205 (1965). A container which is used to convey or deliver the property would seem to be included in the larger category or all inclusive term "conveyance."

D. The Court's Opinion Is In Direct Conflict with the Practices of All States and with the Case Law in the State of Michigan.

The opinion of the Supreme Court of Oregon reaches further to find nexus than any since enactment of Public Law 86-272. The decision is contrary to the present practice of all States and is in direct conflict with the decision in the only known case where the presence of returnable kegs had been urged as creating nexus.

In *Pabst Brewing Company* v. *Department of the Treasury,* Case No. 2210, CCH Mich. State Tax Rep. ¶200-481 (Oct. 18, 1972), the Michigan Court of Claims found that Pabst was exempt from taxation by Michigan on net income derived from interstate commerce on the basis of the finding that:

> ". . . Pabst did not maintain any office or other physical facility in the State of Michigan, was not qualified to do business in the State of Michigan . . ."
>
> ". . . *the only property* owned by Pabst in the State of Michigan *was returnable beer barrels* of a value of $269,914.46 and the Michigan payroll of Pabst . . ." (Emphasis added)

The Court held that Public Law 86-272 barred the Michigan tax on Pabst income, because the only business activities carried on by Pabst in Michigan during the year consisted of solicitation of orders by sales representatives.

The State moved for a new trial and reconsideration, and relied particularly on the Olympia decision. The presiding judge denied this Motion on November 14, 1973, and stated:

> "I agree with defendant's proposition that the exemption provisions of the Federal Interstate Tax Limitation Act should be strictly construed. But even with a strict construction I am still only able to find from the evidence in the Pabst case that *the business activity* conducted by Pabst in Michigan *consisted solely of the solicitation of orders for the sale of its beer;* that such orders, when received, were sent outside Michigan for approval or rejection and that the orders were then filled by shipment or delivery of the beer involved from a point outside Michigan. The *bare bones agreed-upon fact that Pabst had returnable beer barrels valued at $269,914.46 within the State of Michigan in 1964 together with all reasonable inferences to be drawn therefrom simply does not suffice to permit me to find otherwise."* (Emphasis added).

E. The Court's Reliance on American Refrigerator Transit Is Not Justified by the Facts Here.

The sole authority relied upon by the court below is *American Refrigerator Transit Co.* v. *Tax Commission,* 238 Or. 340, 395 P.2d 127 (1964). There the Supreme Court of Oregon decided that a foreign corporation was subject to tax on income derived from leasing refrigerator cars operating in Oregon at a fixed rate per mile. Income from lease transactions

is not exempt from Public Law 86-272 as the court recognized.

Leasing was the business activity generating income for that taxpayer in Oregon. The cars produced its revenue.

Brewers do not lease or sell kegs. Kegs do not produce revenue. Beer is the revenue producing product. Beer is tangible personal property, containerized, sold and shipped across state lines, and, therefore, within the immunity of Public Law 86-272.

F. The Decision if Not Reversed Will Serve To Limit Further the Application of Public Law 86-272 to the Detriment of the Broad National Economy.

Public Law 86-272 was designed to restore a degree of coordination and unformity in vew of the wide diversity and indiscriminate use of sources and rates by the state taxing systems. The Senate Finance Committee reported:

> "Your Committee believes that unless some certainty is restored to this area, the economic implications for the economy of the entire Nation may be unfortunate. . . ." (S. Rep. No. 658, 86th Cong., 1st Sess. 1959)

This Court has summarized the impetus behind Congressional enactment of Public Law 86-272 in the recent opinon in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972). The decision in *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 450 (1959) had created serious apprehension in the commercial community because of its inadequate specification of the local activities required to create a sufficent nexus to justify the States' power to tax.

This case provides an opportunity for the Supreme Court to amplify its interpretation of Public Law 86-272 in *Heublein*. We submit that the facts in *Heublein* differ substantially from this case. The Supreme Court found that there was a direct transfer of Heublein's products by a Heublein representative within the confines of the State. The sale was localized. Olympia neither consummated sales of beer within Oregon, nor transferred or dispensed it within the boundaries of the State.

If, however, the *Heublein* opinion failed to establish guidance as the Department of Revenue suggested, it is hoped that the Supreme Court will accept this opportunity to do so. Guidance is required to restore a degree of certainty and to prevent the total emasculation of Public Law 86-272.

If, as Olympia has suggested, *Heublein* confirms that the presence of kegs does not constitute nexus, this guideline must be enforced and the decision in *Olympia* must be reversed.

Otherwise, the contradictory opinion will lead to confusion of the type the Public Law was designed to dispel.

An example of the extent to which the temptation to tax affects policy is reflected in the position taken earlier by the Oregon State Tax Commission in *Cal-Roof Wholesale, Inc.* v. *State Tax Commission,* 242 Or. 35, 410 P 2d 233 (1966). The Supreme Court of Oregon pointed out there that, in an effort to prevent allocation of income to Washington State by an Oregon corporation with income in Washington, the Tax Commission argued that the Oregon corporation had *not* established "nexus" in Washington State, although its salesman in Oregon not only solicited, but

collected delinquent accounts, picked up merchandise which customers did not want and customarily carried a supply of small items which he sold and delivered within the State of Washington.

Shortly after enactment of Public Law 86-272 the Attorney General of Oregon expressed concern as to its application and indicated that he would look for "elements" beyond solicitation in reaching for jurisdiction to tax.[8]

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[8] "Did the legislation establish a 'low water mark' of activity or 'nexus' below which the state may not proceed or did the statute simply extract from taxability a particular situation and leave as unresolved, as prior to the enactment of the new statute, all other situations?

"It is our thinking that the exemption under the statute must be confined to the particular situations covered by the statute. For example, we intend to scrutinize closely the actual facts of a particular situation, and attempt to determine whether or not there are activities or elements additional to solicitation carrying the situation beyond the solicitation of orders for sales of tangible personal property. There may be activities or elements which will have to be recognized as incidental to and a part of solicitation. I am sure that different states will arrive at different conclusions, for example, as to whether investigating credit or maintaining bank accounts take the company out from under the unbrella of the statute.

"We are not satisfied that the legislation effectively knocked out the taxability of corporations employing persons in activities in the state not constituting solicitation of orders; i.e., where employes are engineers, or are not authorized to take orders. Here, the same question of 'nexus' arises, and we must be satisfied that both the commerce clause and the due process clause are not violated.

* * *

"In the long run, it appears doubtful that an exemption program by itself will give the stability desired as to determinability of taxable status. . . . The comments contained herein have not been submitted to the Commissioners themselves for approval but are our observations as legal counsel for the Commission." *Letter from Attorney General, State Tax Commission,* November 13, 1959.

In 1962, Olympia obtained a ruling specifying that it was exempt from the Oregon Corporation Income Tax Law.[9]

Seven years after the enactment of Public Law 86-272 Oregon enunciated the policy that even where a foreign corporation received a certificate of authority to do business in Oregon, it would not be subject to the corporation excise tax if its activities were limited to interstate commerce. LDA, Vol XVII, No. 30 OF 1915, April 22, 1966.

Despite the fact that there had been no subsequent amendment to Public Law 86-272 or any federal judicial decision affecting its application to the facts in Olympia, Oregon, through its Department of Revenue has now decided that Public Law 86-272 should be interpreted differently to permit taxation of Olympia's income; and the Supreme Court of Oregon has affirmed this interpretation.

In the fourteen years since its enactment, the States have continued to interpret and apply Public Law 86-272 in their own fashion so as to increase revenue where possible. This is not to suggest that the States have done more than follow the course of human nature. They have succumbed to the natural temptation to absorb more than their fair share of interstate

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[9] On July 23, 1971, the Oregon Department of Revenue rendered its opinion in this case, noting:

> "(a) That income tax returns need only be filed for the years beginning January 1, 1966 to date in view of the State Tax Commission's earlier ruling in May of 1962 that the taxpayer was exempt from the Oregon corporation income tax laws."

revenue. Mr. Justice Frankfurter's dissent in *Northwestern States,* recognized the dangers of this course. [10]

Mr. Justice Frankfurter's fears were allayed when businessmen throughout the Nation uncertain and apprehensive of the effects of *Northwestern States* convinced the Congress to enact Public Law 86-272. This bulwark has been consistently eroded over the years; and, to date, the Congress has not enacted additional legislation to clarify the problems of inter-state taxation for which the law was recognized as but a stopgap measure.

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[10] " . . .

"I do not think we should take this new step. My objection is the policy that underlies the Commerce Clause, namely, whatever disadvantages may accrue to the separate States from making of the United States a free-trade territory are far outweighed by the advantages not only to the United States as a Nation, but to the component States. I am assuming, of course, that today's decision will stimulate, if indeed it does not compel, every State of the Union, which has not already done so to devise a formula of apportionment to tax the income of enterprises carrying on exclusively interstate commerce. As a result, interstate commerce will be burdened not hypothetically but practically, and we have been admonished again and again that taxation is a practical matter.

* * *

"The extensive litigation in this Court which has challenged formulas of apportionment in the case of railroads and express companies—challenges addressed to the natural temptation of the States to absorb more than their fair share of interstate revenue—will be multiplied many times when such formulas are applied to the infinitely larger number of other businesses which are engaged in exclusively interstate commerce.

"The problem calls for solution by devising a Congressional policy. . . . The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources." *Northwestern States Portland Cement Co.* v. *State of Minnesota,* 358 U.S. 450, 474, 476-7 (1959).

There is no assurance when Congress will act on the subject although hearings have been concluded recently on S. 1245 and S. 2092 by the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance.

The balance between a broad national economy and the States' authority to tax is a delicate one. The balance is apparently particularly difficult for the legislature to achieve because of the strong interests involved on every side. The fact that Congress has yet to adopt legislation to supplant Public Law 86-272 in the fourteen years since 1959 is concrete evidence of this difficulty.

Public Law 86-272, though stopgap, was motivated by a decision of the United States Supreme Court and represented a step forward in the interest of the national economy. This case graphically illustrates the nullification of the Law.

The only way vitality can be restored to Public Law 86-272 is for the United States Supreme Court to give the first direct substantive opinion on the Law in the fourteen years since its enactment. Such an opinion could not be disregarded by the States as *dicta* as the Supreme Court of Oregon has apparently regarded language in the opinion in *Heublin*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari herein.

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